Supreme Judicial Court of Massachusetts.

CHARLES H. CLEMENT *v.* WESTERN UNION TELEGRAPH CO.

A stipulation in a telegraph blank that the company shall not be liable for mistakes or delays in the transmission or delivery of any unrepeated message, whether happening by negligence or otherwise, beyond the amount received for sending the same, is valid and binding, and the sender of such a message cannot recover beyond the amount paid, even though the delay was caused by the negligence of the company's servant in delivering the message.

Although the telegraph blank with the printed conditions is not used, if the sender is aware of the conditions under which the company by its rules accepts and transmits messages, he is bound by such conditions.

TORT for injuries sustained by the plaintiff in consequence of the neglect of the defendant seasonably to deliver a message sent by telegraph. In the Superior Court, the case was sent to an auditor, who found the following facts:

On April 27th 1880, the plaintiff, who lived in Haverhill, had a libel of divorce pending in the Supreme Judicial Court, then sitting in Salem, and had arranged with H. P. Moulton, his attorney, to give him notice when the case was to come on. The case being in order for the next day, Moulton, on the 27th, left at the office of the American Union Telegraph Company in Salem the following message: "Salem, April 27th 1880. To Charles H. Clement, 2 Benjamin Street, Haverhill, Mass. Come to-morrow with witnesses. H. P. Moulton."

The office at the time was in charge of the office boy only, and nothing was said as to whether the American Union Telegraph Company had a line to Haverhill or not. That company had no line to Haverhill, and the operator, upon her return to the office, finding this message, endeavored ineffectually to communicate with Moulton, but not finding him at his office, she left a note for him stating the fact, and that the message had been, or would be, sent by the Western Union Telegraph Company. Not being able to inform Moulton that her company had no line to Haverhill, she tore off the heading printed upon the blank above the message written, and sent the message to the office of the Western Union Telegraph Company, also in Salem, for transmission to Haverhill; and it was there received by the defendant's agent and duly transmitted to their office in Haverhill. The message did not appear to have been rewritten upon a blank of the defendant company, but the terms and conditions upon which the defendant by its rules

provided that messages should be sent over its line, as set forth in the form or blank in use by it, were in fact known to Moulton, and this form of blank had been in use by him in sending messages by the defendant's line. Subsequently to the sending of the message, and after April 27th, the operator of the American Union Telegraph Company explained to Moulton how it was sent by that line, and Moulton said to her that it was all right.

The form in use by the defendant corporation contained, among other stipulations the following: "All messages taken by this company subject to the following terms: To guard against mistakes or delays, the sender of a message should order it repeated; that is, telegraphed back to the originating office for comparison. For this, one half the regular rate is charged in addition. It is agreed between the sender of the following message and this company, that said company shall not be liable for mistakes or delays in the transmission or delivery, or for non-delivery, of any unrepeated message, whether happening by negligence of its servants or otherwise, beyond the amount received for sending the same."

The message was received at the office of the defendant in Haverhill about fifteen minutes before eight o'clock in the evening of April 27th 1880. It was held at the office until the hour of closing, at eight o'clock, when it was given with others to the messenger boy for delivery. The plaintiff lived at No. 2 Benjamin Street, in Haverhill, distant from the defendant's office something more than half a mile. There was no evidence whether any effort was made by the messenger to deliver the message, except the fact that the message was returned to the office the next morning with the report that he could not find the plaintiff. The message was not in fact received by the plaintiff until May 2d.

On April 28th the case was reached in its order, and the court ordered the libel dismissed because the libellant and his witnesses were not present. The failure of the plaintiff to attend court was by reason of the non-delivery of Moulton's message aforesaid in season for the plaintiff or his witnesses to be in attendance when the case was reached.

The plaintiff had incurred expense for counsel fees in the libel suit, and for the attendance of himself and witnesses at prior terms of the court, and for the libellee's costs.

Upon these facts, the auditor found that the message in question was sent upon and subject to, the condition and agreement, that,

unless it was repeated or insured, no damages beyond the cost of the message could be recovered for any failure or delay in the delivery of it, that the defendant, by its agents, was guilty of gross negligence in not delivering said message to the plaintiff, or at his place of abode, to which it was directed ; that the message was sent by Moulton under an arrangement and agreement that the plaintiff should so receive notice when his case was to be reached in order for trial, but that the defendant and its agents receiving and transmitting said message were not informed of the circumstances under which it was sent, nor as to its importance, or of any especial or peculiar injury or damage that might result from neglect or failure to transmit or deliver the same; and that the defendant was not liable for the items of damage claimed, except for the sum of twenty-five cents paid for the cost of the message, with interest thereon from the date of the writ.

In the Superior Court, the case was tried before ROCKWELL, J., without a jury, on the auditor's report. The judge ruled that the plaintiff was only entitled to recover the amount paid for sending the message, and found for him accordingly. The plaintiff alleged exceptions.

H. N. Merrill and *J. O. Wardwell,* for the plaintiff.

G. S. Hale and *C. F. Walcott*, for the defendant.

The opinion of the court was delivered by

MORTON, C. J.—The evidence was sufficient to justify the auditor and the presiding justice of the Superior Court in finding that the contract with the defendant, made by the plaintiff through his agent Moulton was subject to the conditions and stipulations contained in the form issued by the defendant. One of these stipulations is as follows: " It is agreed between the sender of the following message and this company, that said company shall not be liable for mistakes or delays in the transmission or delivery, or for non-delivery, of any unrepeated message, whether happening by negligence of its servants or otherwise, beyond the amount received for sending the same."

It has been held in this commonwealth, that a regulation or stipulation of this character is reasonable and binding upon the parties to it: *Grinnell* v. *Western Union Telegraph Co.*, 113 Mass. 299, and cases cited. In the case at bar, the plaintiff did not

repeat his message, and it follows that, under the contract which he made, he can recover only twenty-five cents, the cost of the message.

The plaintiff contends that, as the auditor has found that the defendant by its agents was guilty of gross negligence in not delivering the message seasonably, this stipulation does not exempt the defendant from liability for the damages actually sustained.

The only negligence shown in this case was an unexplained delay in delivering the message on the part of the messenger boy, to whom it was, after its receipt, entrusted for delivery. It may be that the company might be guilty of some fraudulent or gross negligence in transmitting or delivering a message, so that it would not be protected by its regulation from liability for the actual damages, though in excess of the sum stipulated. But the negligence of the messenger boys in delivering messages was plainly contemplated by the parties when they entered into the stipulation; and there are no principles of public policy which should prevent the company from stipulating that it will not be responsible for such negligence beyond a fixed amount, unless it receives a reasonable compensation for assuming further responsibility.

Without discussing the question as to what is the difference, if any, between ordinary and gross negligence, we are of opinion that the only negligence proved in this case was such negligence as the parties intended to include in their stipulation; and that such stipulation, as applied to such negligence, is reasonable and valid. It follows that the Superior Court rightly ruled and found that the plaintiff was entitled to recover only twenty-five cents.

Exceptions overruled.

DUTY OF TELEGRAPH COMPANIES AS TO MESSAGES.—Although there are some cases to the contrary: *Parks* v. *A. C. Tel. Co.*, 13 Cal. 422; *Baldwin* v. *U. S. Tel. Co.*, 1 Lans. 125, the weight of authority clearly is that telegraph companies are not common carriers: *Birney* v. *N. Y. & W. T. Co.*, 18 Md. 341; *W. U. T. Co.*, v. *Carew*, 15 Mich. 525; *Breese* v. *U. S. Tel. Co.*, 45 Barb. 274.

They, however, exercise a public employment, with duties and obligations analogous to those of common carriers and other public servants: *Graham* v. *Davis*, 4 Ohio St. 377; *Telegraph Co.* v. *Griswold*, 37 Id. 311; *Breese* v. *U. S. Tel. Co.*, 48 N. Y. 132; *Passmore* v. *W. U. Tel. Co.*, 78 Penn. St. 238; *Tyler* v. *W. U. Tel. Co.*, 60 Ill. 421.

They must transmit all prepaid messages presented for transmission (*Breese* v. *U. S. Tel. Co.*, 48 N. Y. 132), excepting such as are indecent or contrary to law (*W. U. Tel. Co.* v. *Ferguson*, 57 Ind. 495), with a care and diligence adequate to the business: *Breese* v. *U. S. Tel. Co.*, 48 N. Y. 132.

Ordinary care and diligence must at least be used by the company: *Pope* v. *W. U. Tel. Co.*, 9 Ill. App. 284. This means more than that the company need deliver a message only at the office of the receiver. If he is not there it must use ordinary diligence to find him: *Pope* v. *W. U. Tel. Co.*, 9 Ill. App. 284. It must send the message not merely to the telegraph station, but to the person addressed: *W. U. Tel. Co.* v. *Lindley*, 62 Ind. 371. Messages must be sent with reasonable promptitude, though what is reasonable depends upon the circumstances of each case, and is to be determined by a jury: *Behm* v. *W. U. Tel. Co.*, 8 Biss. 131. It is not the duty of the company to keep more than one operator at a small station, and delay while he is at dinner is not negligence: *Behm* v. *W. U. Tel. Co.*, 8 Biss. 131. Nor is delay at a repeating office unreasonable: *Behm* v. *W. U. Tel. Co.*, 8 Biss. 131. All messages must be transmitted in the order of time in which they are received; unreasonable discrimination is prohibited by law: *Davis* v. *W. U. Tel. Co.*, 1 Cin. 100; *W. U. Tel. Co.* v. *Ward*, 23 Ind. 377; and punitive damages have been held allowable for wilful and unjust discrimination: *Davis* v. *W. U. Tel. Co.*, 1 Cin. 100. But private dispatches must yield to those given precedence by statute—*e. g.*, press dispatches—or to dispatches of a public nature: *W. U. Tel. Co.* v. *Ward*, 23 Ind. 377.

Liability.—The method of enforcing the faithful performance of its duties by a telegraph company is found in the pecuniary responsibility which they incur for failure: *Telegraph Co.* v. *Griswold*, 37 Ohio St. 311. Generally a telegraph company is liable for any loss or damage caused by its negligence in transmitting and delivering messages: *N. Y. & W. Tel. Co.* v. *Dryburg*, 35 Penn. St. 298; *U. S. Tel. Co.* v. *Gildersleve*, 29 Md. 233; *W. U. Tel. Co.* v. *Fontaine*, 58 Ga. 433, and cases *infra*. Instances wherein it has been held liable, are, amongst others, the following: For unreasonably delaying a message announcing the death of the receiver's mother: So *Relle* v. *W. U. Tel. Co.*, 55 Tex. 308; *Logan* v. *W. U. Tel. Co.*, 84 Ill. 468. For its messenger negligently permitting a forged dispatch saying a draft was genuine, to be substituted for one saying the sender (a bank) "had drawn no such bill," and this notwithstanding the plaintiff might recover from the person to whom the draft was paid: *Strause* v. *W. U. Tel. Co.*, 8 Biss. 104. For the negligence of an operator in not knowing of a county seat on the line: *W. U. Tel. Co.* v. *Buchanan*, 35 Ind. 430. For loss caused by failure to deliver correct market reports: *Turner* v. *Tel. Co.*, 41 Ia. 458. And such reports are presumed to have been correctly given to the telegraph company contracting to furnish them. For delay in delivering a message to attach certain property: *Bryant* v. *Am. Tel. Co.*, 1 Daly 576, and the plaintiff need not exhaust his remedies against the debtor before suing the company: Idem. For changing an order to buy 500 bales to one to buy 2500: *W. & N. O. Tel. Co.* v. *Hobson*, 15 Grat. (Va.) 122. For a failure to forward beyond an intermediate office: *U. S. Tel. Co.* v. *Wenger*, 55 Penn. St. 262. For sending a message authorizing a bank to give credit when the operator knew the sender was not the cashier by whom the message purported to have been signed, and knew that the sender had no authority to act for such cashier: *Elwood* v. *W. U. Tel. Co.*, 45 N. Y. 549. For delay in sending a message by an attorney directing that a case "on call" be held without adjournment until he could come: *Sprague* v. *W. U. Tel. Co.*, 6 Daly 200.

But a telegraph company is not liable for errors or imperfections in transmitting messages which arise from causes not within its control; that is, a failure of the electrical current, irregularities in its power or efficiency, and interruptions or confusions arising from storm or wind,

heat or cold; nor from imperfections in the working of the wires arising from necessary imperfections or inherent characteristics in the metals, or from things necessarily pertaining to the business of communicating by telegraph, or the machinery and implements invented for that purpose: *White* v. *W. U. Tel. Co.*, 14 Fed. R. 710; *Sweatland* v. *I. & M. Tel. Co.*, 27 Ia. 433.

SAME—CONNECTING LINES.—Connecting telegraph companies are bound to transmit messages at the request of other companies, and are liable for negligence in not doing so: *Baldwin* v. *U. S. Tel. Co.*, 54 Barb. 505. The agency of one company to take messages for another has been presumed: *Baldwin* v. *U. S. Tel. Co.*, 54 Barb. 505; 1 Lans. 125. But see s. c. 45 N. Y. 744. A limitation of liability applies only to the first company, and not to succeeding connecting lines: *Squire* v. *W. U. Tel. Co.*, 98 Mass. 232. A statute requiring telegraph companies under penalty to take messages from connecting lines is beneficial to the public, and should be liberally construed: *U. S. Tel. Co.* v. *W. U. Tel. Co.*, 56 Barb. 46. But see *Thurn* v. *Alta Tel. Co.*, 15 Cal. 472. If the negligence be by a connecting company, either the first telegraph company or the sender may sue for the penalty: *U. S. Tel. Co.* v. *W. U. Tel. Co.*, 54 Barb. 46; *W. U. Tel. Co.* v. *Ward*, 23 Ind. 377.

CONSIDERATION.—The mutual obligations of the sender and the company are sufficient consideration to maintain the action, although no money was paid for transmission: *W. U. Tel. Co.* v. *Meek*, 49 Ind. 53.

NATURE OF ACTION.—The action for damages for a failure to deliver a message may be at common law or by statute. Although an action *ex delicto* it is founded upon a contract; and that contract is the contract to transmit, not the contract the benefit of which was lost by the telegraph company's negligence: *W. U. Tel. Co.* v. *Hopkins*, 49 Ind. 224.

PARTIES.—Either the receiver or the sender of a message may sue the telegraph company for negligence in transmitting or delivering it: *Aiken* v. *Tel. Co.*, 5 S. C. 358; *W. U. Tel. Co.* v. *Fenton*, 52 Ind. 1; *Rose* v. *U. S. Tel. Co.*, 3 Abb. Pr. N. S. 409; 34 How. Pr. 308; but it has been decided that the sender cannot sue a connecting telegraph company for its negligence. He must sue the company with whom he made his contract: *Thurn* v. *Alta Tel. Co.*, 15 Cal. 473. In Maryland it is decided that a broker telegraphing an order may sue in his own name, but as trustee for his principal, for damages in delaying it: *U. S. Tel. Co.* v. *Gildersleve*, 29 Md. 232. In New York it is decided that the broker cannot sue, but the principal must: *Rose* v. *U. S. Tel. Co.*, 6 Rob. 305; 3 Abb. Pr. (N. S.) 409; 34 How. Pr. 308. In California it is held that in order to give a right of action to the principal the fact of the agency must have been disclosed: *Thurn* v. *Alta Tel. Co.*, 15 Cal. 472.

DEFENCES.—There are, however, many exceptions and limitations to the doctrine that a telegraph company is liable for damages caused by its delays and errors in sending messages. Such a company may make reasonable rules and regulations for the transaction of its business, non-observance of which may form a good defence to an action for damages against it: *U. S. Tel. Co.* v. *Gildersleve*, 29 Md. 232; *Sweatland* v. *I. & M. Tel. Co.*, 27 Ia. 433; *Passmore* v. *W. U. Tel. Co.*, 78 Penn. St. 238; *W. U. Tel. Co.* v. *Graham*, 1 Col. T. 230; *W. U. Tel. Co.* v. *Buchanan*, 35 Ind. 430; *Breese* v. *U. S. Tel. Co.*, 48 N. Y. 132.

Thus, a rule that the company will not be liable for the correct transmission of the message beyond the amount received therefor, unless repeated at an additional expense, is a reasonable regu-

lation: *Becker* v. *W. U. Tel. Co.*, 11 Neb. 87; *Redpath* v. *W. U. Tel. Co.*, 112 Mass. 71; *Schwartz* v. *A. & P. Tel. Co.*, 18 Hun 157; *Wann* v. *W. U. Tel. Co.*, 37 Mo. 472; *Breese* v. *U. S. Tel. Co.*, 45 Barb. 274; *Camp* v. *W. U. Tel. Co.*, 1 Metc. (Ky.) 164; *U. S. Tel. Co.* v. *Gildersleve*, 29 Md. 232; *Sweatland* v. *I. & M. Tel. Co.*, 27 Ia. 433.

There can be no recovery on an unrepeated message unless gross negligence or fraud is proved: *Redpath* v. *W. U. Tel. Co.*, 112 Mass. 71. Nor is proof of a mistake in an unrepeated message *prima facie* proof of negligence: *Sweatland* v. *I. & M. Tel. Co.*, 27 Ia. 434; *Becker* v. *W. U. Tel. Co.*, 11 Neb. 87.

But a rule exempting from liability where the message is unrepeated does not apply where the company makes no effort to send the message: *Birney* v. *N. Y. & W. Tel. Co.*, 18 Md. 341. Nor is a failure to repeat a defence against a failure to deliver: *W. U. Tel. Co.* v. *Graham*, 1 Col. T. 230. But it has been decided that non-observance of such a rule is a good defence even though the mistake is of such a kind as would not have been prevented by repetition: *Grinnell* v. *W. U. Tel. Co.*, 113 Mass. 299. The rule as to repetition has also been held void in law: *W. U. Tel. Co.* v. *Tyler*, 74 Ill. 168; and again, to exempt from such errors only as arose from causes beyond the control of the company: Idem. See, also, *Passmore* v. *W. U. Tel. Co.*, 9 Phil. 90.

So, also, a telegraph company may make a rule as to the time and manner of presenting claims to it for damages, as that such claims shall be presented within sixty days from sending the messages: *Wolf* v. *W. U. Tel. Co.*, 62 Penn. St. 83; *Young* v. *W. U. T. Co.*, 65 N. Y. 163; and presentment of an imperfect claim for damages within sixty days to a clerk not authorized to audit it, is not compliance with the condition, even though the proper officer be temporarily absent: *Young* v. *W. U. Tel. Co.*, 65 N. Y. 163; and the words "presented in writing," mean that the claim shall be delivered and left with the proper official: Idem. So a rule requiring presentment in twenty days is lawful: *Aiken* v. *Tel. Co.*, 5 S. C. 358.

Ordinarily the conditions upon which messages are received for transmission are printed upon blanks furnished by the company upon which to write messages. The sender of the message is held bound by the conditions so printed on the blank he uses: *Breese* v. *W. U. Tel. Co.*, 45 Barb. 274; *W. U. Tel. Co.* v. *Carew*, 15 Mich. 525; *Young* v. *W. U. T. Co.*, 65 N. Y. 163; 34 N. Y. Sup. Ct. 390; *Birney* v. *N. Y. & W. Tel. Co.*, 18 Md. 342. The receiver also is bound by such conditions: *Aiken* v. *Tel. Co.*, 5 S. C. 358. So is any person sending a message, if he knows of the rules or conditions, whether he uses a blank containing them or not; *W. U. Tel. Co.* v. *Buchanan*, 35 Ind. 429. Knowledge will be inferred against him from his long possession and constant use of the blanks: *Breese* v. *U. S. Tel. Co.*, 48 N. Y. 132. There must be an actual express or implied contract to abide by the conditions. Notice merely of such conditions will not release from liability: *Baldwin* v. *U. S. Tel. Co.*, 1 Lans. 125. Although the conditions be printed in small type, yet if the heading calling attention to them be in large type, they will be binding: *Wolf* v. *W. U. Tel. Co.*, 62 Penn. St. 83. And rules established by law are part of the contract: *U. S. Tel. Co.* v. *Gildersleve*, 29 Md. 232.

Sometimes the company's negligence is not the proximate cause of the damage, and it is held not liable, although clearly guilty of an error. Thus, where B. telegraphed A. for $500 and the message read $5000, which was sent, whereupon B. absconded with it. *Held*, that the telegraph company was not liable: *Lowery* v. *W. U. Tel. Co.*, 60

N. Y. 198. See, also, *First Nat. Bank* v. *W. U. T. Co.*, 30 Ohio St. 555.

An impostor, at Cincinnati, sent a dispatch in the name of B. over defendant's line, to C., at Selma, Ala., requesting C. to send a telegraphic money order to B., at Cincinnati. C. thereupon purchased of defendant, at Selma, a telegraphic money order payable to B. at Cincinnati, and defendant paid the money there to the impostor who was the sender of the message: *Held:* First. Where there is nothing to create suspicion in the minds of the agents of a telegraph company, it is the duty of the party of whom the request is made to remit the money, to ascertain for himself whether he who makes the request is the person he professes to be. Second. In the absence of anything arousing suspicion, the telegraph company has no right to refuse payment of the money to him in reply to whose message it was sent; and it is not liable for a payment made *bona fide* to such person, though it turns out that he was an impostor: *W. U. Tel. Co.* v. *Meyer*, 61 Ala. 159.

Acceptance of the amount paid by the sender for transmission is not a defence: *W. U. Tel. Co.* v. *Buchanan*, 35 Ind. 430. Neither is it a good defence that lines were in good order and competent and faithful servants employed: *W. U. Tel. Co.* v. *Meek*, 49 Ind. 53. The fact that the negligence occurred out of the state from which the message was sent, and which state gave by its statute the action for the penalty, will not defeat the suit: *W. U. Tel. Co.* v. *Hamilton*, 50 Ind. 181. And an ineffectual attempt to deliver a message after business hours, or on Sunday, is no excuse for a failure to deliver: *W. U. Tel. Co.* v. *Lindley*, 62 Ind. 371. But the fact that the person to whom the message was addressed did not live within a specified distance of the telegraph station may be matter of defence: Ibid.

PLEADING.—In a suit to recover a penalty for a failure to transmit, the complaint must, as required by the statute, aver that the defendant was "engaged in telegraphing for the public." An averment that it was "engaged in the business of transmitting telegraphic messages for hire" will not suffice; nor will it be helped by the court taking judicial notice of the fact that the company is a public servant: *W. U. Tel. Co.* v. *Axtell*, 69 Ind. 199. See, also, *W. U. Tel. Co.* v. *Ferguson*, 57 Ind. 495.

EVIDENCE.—The onus is on the plaintiff to prove negligence: *U. S. Tel. Co.* v. *Gildersleve*, 29 Md. 233; and upon the company to excuse a mistake: *Turner* v. *Tel. Co.*, 41 Ia. 458.

Failure to transmit and deliver the message in the form or language in which it is received, is *prima facie* negligence, for which the company is liable, and to exonerate itself from liability thus presumptively arising it must show that the mistake was not attributable to its fault or negligence: *Telegraph Co.* v. *Griswold*, 37 Ohio St. 313; *Bartlett* v. *W. U. Tel. Co.*, 62 Me. 209; *Rittenhouse* v. *Independent L. Tel. Co.*, 44 N.Y. 263; *Tyler* v. *W. U. Tel. Co.*, 60 Ill. 421; *Baldwin* v. *U. S. Tel. Co.*, 45 N. Y. 744; *W. U. Tel. Co.* v. *Carew*, 15 Mich. 525; *DeLa Grange* v. *S. W. Tel. Co.*, 25 La. Ann. 383; *W. U. Tel. Co.* v. *Meek*, 49 Ind. 53; *Turner* v. *Hawkeye Tel. Co.*, 41 Ia. 458.

In a suit against a telegraph company for a failure to deliver a message, the original message given the operator must be given in evidence or its absence accounted for: *W. U. Tel. Co.* v. *Hopkins*, 49 Ind. 223. An operator's admission of error, made several days after the message was sent, is not evidence against the company, not being part of the *res gestæ*: *Aiken* v. *Tel. Co.*, 5 S. C. 358. See, also, *Sweatland* v. *I. & M. Tel. Co.*, 27 Ia. 433. The mere fact of an error in an unrepeated message, is not, without further proof of carelessness, sufficient to authorize a recovery of more than the sum paid for transmission: *Becker* v.

W. U. Tel. Co., 11 Neb. 87. Evidence of a local usage in the telegraph office is inadmissible to vary the terms of the contract by which the message was sent: *Grinnell* v. *W. U. Tel. Co.*, 113 Mass. 299. Nor is evidence admissible that the company made a deduction from the pay of the operator on account of the negligence: *Grinnell* v. *W. U. T. Co.*, 113 Mass. 299.

Telegrams are often used as evidence of contracts between the sender and the receiver. The party who sends an order by telegraph makes the telegraph company his agent to transmit and deliver it. He is bound by the message as delivered: *Dunning* v. *Roberts*, 35 Barb. 463; and where the legal rights of the receiver founded upon such order are in question, he is entitled to put in evidence the message actually received, as the original: *Saveland* v. *Green*, 40 Wis. 431. See, also, *Taylor* v. *Steamboat R. Co.*, 20 Mo. 254; *Commonwealth* v. *Jeffries*, 7 Allen 548. But a dispatch offered in evidence must be proved to be authentic (*Richie* v. *Bass*, 15 La. Ann. 668) either by proof of the operator's handwriting or otherwise. But a wife's telegrams cannot be used against her husband: *Benford* v. *Sanner*, 40 Penn. St. 9.

A telegraph company may be required to produce telegrams for use as evidence upon *subpœna duces tecum*, and this notwithstanding a statute making it a misdemeanor for any person employed in transmitting messages by telegraph to make known the contents of any message to any person except to him to whom it is addressed, or to his agent or attorney: *Woods* v. *Miller*, 55 Ia. 168. And see *Ex parte Brown*, 7 Mo. App. 484. Nor can the manager of a telegraph company refuse to produce a telegram, upon order so to do by a court, on the ground that, by so doing, he would violate his duty to the company, and he is punishable for contempt if he refuse: *Ex parte Brown*, 7 Mo. App. 484. But while an agent of a company is punishable for contempt in refusing to produce messages in possession of the company before a grand jury, on proper process, a *subpœna duces tecum* merely describing such messages by the names of the senders and the persons addressed and as sent "within fifteen months last past," is not such process: *Ex parte Brown*, 72 Mo. 83; 37 Am. Rep. 426. See, also, *Ex parte Brown*, 7 Mo. App. 484.

DAMAGES.—The general rule is that a party injured by error, delay, or failure, by negligence, in transmitting and delivering a telegram, is entitled to recover all his damages, including gains prevented as well as losses sustained. This rule is subject to two qualifications: The damages must be such as may fairly be supposed to have entered into the contemplation of the parties when they made the contract; that is, such as might naturally be expected to follow its violation, and they must be certain: *Landsbeger* v. *Am. Tel. Co.*, 32 Barb. 533; *Griffin* v. *Colver*, 16 N. Y. 489; *Baldwin* v. *U. S. Tel. Co.*, 1 Lans. 125.

Instances of the application of the rule that a telegraph company is not liable for all damages which may arise from its negligence in sending and delivering a message, the importance of which it is not informed and cannot estimate from reading the dispatch, are these: Where the dispatch is in cipher, or obscurely worded, nominal damages only are recoverable, unless the company has been informed of its nature: *Candee* v. *W. U. Tel. Co.*, 34 Wis. 471; *Behm* v. *W. U. Tel. Co.*, 8 Biss. 131; *W. U. Tel. Co.* v. *Martin*, 9 Bradw. 596; *Baldwin* v. *U. S. Tel. Co.*, 45 N. Y. 744; *White* v. *W. U. Tel. Co.*, 14 Fed. R. 710; *Mackay* v. *W. U. Tel. Co.*, 16 Nev. 222. Thus, the company was held not liable where the message was "Sell fifty (50) gold," not having been told that this meant "Sell $50,000 of gold:" *U. S. Tel. Co.* v. *Gildersleve*, 29 Md. 233. The fact that the employees to

whom the message was delivered knew the sender was a stock operator, and that he informed the boy in the office that the dispatch required promptness, is not sufficient information of its nature: *Candee* v. *W. U. Tel. Co.*, 34 Wis. 471. So, where A. wrote B.: "Have you any more northwestern mess pork, or prime mess? Also extra mess? Telegraph price on receipt of this." B. replied by wire thus: "Letter received. No light mess here. Extra mess twenty-eight seventy-five ($28.75)." And A. rejoined by telegraph: "Dispatch received. Will take two hundred extra mess, price named," which dispatch was delayed. *Held*, that A. could not recover damages occasioned by an advance in the meat during the delay: *Beaupre* v. *P. & A. Tel. Co.*, 21 Minn. 155. Nor will a telegraph company be liable for delaying a cipher dispatch, although the telegraph manager knew such dispatches ordinarily related to mining and stock speculations, there being no explanation of the importance of the particular dispatch in question: *Mackay* v. *W. U. Tel. Co.*, 16 Nev. 222. But a message, "Will you give one fifty for twenty-five hundred at London? Answer at once, as I have only till night," is not obscure or in cipher so as to fall within the meaning of a stipulation that the company "assumed no liability for errors in cipher or obscure messages:" *Telegraph Co.* v. *Griswold*, 37 Ohio St. 301.

The measure of damages has also been passed upon in the following cases:

Dispatch: "Can close Valkyria and Othere, 22, 20, net Montreal. Ans. immediately." *Held*, that the commissions which the sender could have earned as a broker in effecting a charter for the two vessels named Valkyria and Othere, if the message had been duly transmitted, were not damages either actually contemplated or fairly supposed to have been contemplated by defendant, and, therefore, not recoverable: *McCall* v. *W. U. Tel. Co.*, 44 N. Y. Superior Ct. 487; 7 Abb. N. Cas. 151.

A telegraphic order for *sacks* of salt was transmitted *casks*. The casks were shipped and had to be sold at below the market price at the place of shipment. *Held*, that the difference between such market price and the selling price, together with the expense of transportation, was not an improper measure of damages: *Burton* v. *Tel. Co.*, 41 N. Y. 545.

For delaying a dispatch ordering an attachment until other creditors obtained attachments exhausting the assets of the debtor, the amount of the sender's claim has been held recoverable (*Parks* v. *Alta Tel. Co.*, 13 Cal. 422), less any sum which the sender may have received on account of his debt: *Bryant* v. *Am. Tel. Co.*, 1 Daly 576.

Where an incorrect telegraphic market report induced A. to buy, he was held entitled to the difference between the actual purchase price and that stated in the report: *Turner* v. *Hawkeye Tel. Co.*, 41 Ia. 458. An advance in the price of stock ordered has been held to be the measure of damages: *U. S. Tel. Co.* v. *Wenger*, 55 Penn. St. 262.

On failure to deliver promptly a message to "ship oil soon possible," the profits which might have been made on the oil if the message had been delivered and the oil sent in due time, are not the measure of damages, but plaintiff may recover the money paid by him for transmitting the message, the advance in freight, and his expenses incurred by failure of defendant to fulfil the contract: *W. U. Tel. Co.* v. *Graham*, 1 Col. T. 230.

Where a message to "buy five Hudson" was delivered as "buy five hundred," and before it could be corrected an advance occurred by which sender lost $1375, this sum was held to be the measure of damages: *Rittenhouse* v. *I. L. Tel. Co.*, 44 N. Y. 263.

If a telegraph company contract to

transmit without any special restriction of their liability a message accepting an offer to sell certain goods at a certain place for a certain price, and by their negligence in delivering it the sender fails to complete the purchase, he may recover from them, in damages, the difference between the price which, by the message, he agreed to pay, and the price he would have been compelled to pay at the same place in order, with use of due diligence, to have purchased goods there of the same kind, quality and quantity: *Squire et al.* v. *W. U. Tel. Co.*, 98 Mass. 232. See, also, *True* v. *I. Tel. Co.*, 60 Me. 9.

Damages for failure to obtain employment as a pilot have been held not remote or speculative: *W. U. Tel. Co.* v. *Fenton*, 52 Ind. 1; and in any case of telegraphic negligence nominal damages are recoverable, although actual damages be not proved: *First Nat. Bk.* v. *Tel. Co.*, 30 Ohio St. 555; and, indeed, damages need not be proved; where a case of negligence is made out, they will be presumed: *Western Union Telegraph Co.* v. *Buchanan*, 35 Ind. 430.

The California and Massachusetts cases placed at the head of this note are opposed to each other in their rulings as to the right of a telegraph company to release itself by contract from liability for negligence. Without attempting to reconcile this conflict of authority, which, perhaps, is impossible, it may be well to call attention to the decisions sustaining the views expressed in each of the cases.

The general rule is undoubtedly the same in the case of telegraph companies as with carriers. They cannot, by contract, relieve themselves from liability for negligence. In affirming this rule the California cases are sustained by the following decisions: *Tyler* v. *W. U. Tel. Co.*, 60 Ill. 421; *Sweatland* v. *S. & M. Tel. Co.*, 27 Ia. 432; *Manville* v. *W. U. Tel. Co.*, 37 Id. 214; *True* v. *Int. S. Co.*, 60 Me. 9; *Bartlett* v. *W. U. Tel. Co.*, 62 Id. 209; *W. U. Tel. Co.* v. *Graham*, 1 Cal. 230; *Tel. Co.* v. *Griswold*, 37 Ohio St. 301; *Hibbard* v. *W. U. Tel. Co.*, 33 Wis. 558; *Candee* v. *W. U. Tel. Co.*, 34 Id. 471; *W. U. Tel. Co.* v. *Fontaine*, 58 Ga. 433; *W. U. Tel. Co.* v. *Blanchard*, 68 Id. 299; *W. U. Tel. Co.* v. *Shotter*, 18 Cent. Law Jour. 230 (Georgia 1884); *Dorgan* v. *Tel. Co.*, 1 Am. L. T. Rep. (N. S.) 406 (C. C., S. D. Ala. 1884); *W. U. Tel. Co.* v. *Neill*, 57 Tex. 283; *W. U. Tel. Co.* v. *Brown*, 58 Id. 170; *Womack* v. *W. U. Tel. Co.*, Id. 176; *W. U. Tel. Co.* v. *Catchpole*, Tex. Ct. App., Civ. Cas.; White & Wilson, sect. 268; *Camp* v. *W. U. Tel. Co.*, 1 Metc. (Ky.) 164; *Passmore* v. *W. U. Tel. Co.*, 78 Penn. 238; *W. U. Tel. Co.* v. *Reynolds*, 77 Va. 173; *Hord* v. *W. U. Tel. Co.*, (Super. Ct. Cin., G. T. 1878), 6 Am. L. Rec. 529; *Bell* v. *Dom. L. Co.* (Super. Ct. Montreal 1880), 25 L. C. Jur. 248; *W. U. Tel. Co.* v. *Fenton*, 52 Ind. 1; *Aiken* v. *W. U. Tel. Co.*, 5 S. C. 358, 372; *Express Co.* v. *Caldwell*, 21 Wall. 264, 269; *Pinckney* v. *W. U. Tel. Co.*, 19 S. C. 71, 73.

But see, *Grinnell* v. *W. U. Tel. Co.*, 113 Mass. 299; *Redpath* v. *W. U. Tel. Co.*, 112 Id. 71; *Ellis* v. *Am. Tel. Co.*, 13 Allen 226; *Clement* v. *W. U. Tel. Co.*, 137 Mass.; *Becker* v. *W. U. Tel. Co.*, 11 Neb. 87; *Breese* v. *U. S. Tel. Co.*, 48 N. Y. 132, per EARL, Com.; *Schwartz* v. *A. & P. Tel. Co.*, 18 Hun 157; *White* v. *W. U. Tel. Co.*, 5 McCrary 103; *Jones* v. *W. U. Tel. Co.*, 18 Fed. Rep. 717; *Macandrew* v. *El. Tel. Co.*, 17 C. B. 3; *Potts* v. *El. S. Co.*, 18 Law Rep. 477; *Wann* v. *W. U. Tel. Co.*, 37 Mo. 472; *Lassiter* v. *W. U. Tel. Co.*, 18 Fed. Rep. 90.

But it appears that in Massachusetts, Nebraska and Missouri, telegraph companies may contract against liability for negligence, although a railroad company

may not do so. Compare *Schall District in Medfield* v. *B. H. & E. Rd. Co.*, 102 Mass. 552, with *Grinnell* v. *W. U. Tel. Co.*, 113 Id. 299, 306; *Redpath* v. *W. U. Tel. Co.*, 112 Id. 71; *Ellis* v. *Am. Tel. Co.*, 13 Allen 226. Compare also, *Kirby* v. *Adams Ex. Co.*, 2 Mo. App. 369; and *Drew* v. *Red Line Transit Co.*, 3 Mo. App. 495, with *Wann* v. *W. U. Tel. Co.*, 37 Mo. 472. Compare, also, *A. & N. R. Co.* v. *Washburn*, 5 Neb. 117, with *Becker* v. *W. U. Tel. Co.*, 11 Id. 87.

The weight of authority is therefore in favor of denying the validity of contracts against liability for the telegraph company's negligence.

The decision of the California case is, however, opposed to the weight of authority in ruling upon the liability of the telegraph company for damages resulting from errors in transmitting cipher dispatches. "It is true, that in two or three early cases, the doctrine has been advanced that a telegraph company is liable to its employer for the actual and proximate loss that he sustained through the breach of a contract to communicate a message intelligible to the person addressed, although the company was entirely ignorant when it made the contract of the meaning of the message:" Gray on Tel. Communication, sect. 87, citing *Strasburger* v. *W. U. Tel. Co.* (Super. Ct. N. Y. 1867), Allen's Tel. Cas. 661; *Rittenhouse* v. *Ind. Line of Tel.*, 1 Daly 474; s. c. 44 N. Y. 263; *Bowen* v. *L. E. Tel. Co.* (Com. Pl. Ohio), 1 Am. Law Reg. 685. See, also, *Dougherty* v. *Am. Tel. Co.* (S. C. Ala. 1884), 18 Cent. L. J. 428. But the general rule is that the damages recoverable for the breach of a contract to communicate a message of this description are simply nominal: Idem. Citing *Candee* v. *W. U. Tel. Co.*, 34 Wis. 471; *Mackey* v. *W. U. Tel. Co.*, 16 Nev. 222; *Dorgan* v. *Tel. Co.* (C. C., S. D. Ala. 1874), 1 Am. L. T. Rep. (N. S.) 406; *Daniel* v. *W. U. Tel. Co.*, 61 Tex. 452; *Sandurs* v. *Stuart*, 1 C. P. Div. 326; 15 Chi. Leg. News 220; *W. U. Tel. Co.* v. *Reynolds*, 77 Va. 173; *Dougherty* v. *Am. Tel. Co.*, 18 Cent. L. J. 428; *Pinckney* v. *W. U. Tel. Co.*, 19 S. C. 71, 74. See *supra*, Damages. Also, 23 Am. L. Reg. (N.S.) 281.

ADELBERT HAMILTON.

Chicago.

United States Circuit Court, District of Rhode Island.

MEALEY v. METROPOLITAN LIFE INSURANCE CO.

Where the pleading does not show that an instrument of which profert is made is under seal oyer is not demandable.

Even though oyer is not demandable if it appears that a knowledge of the paper is proper or necessary for either party, it is the practice of the court to make an order for its production.

Where a state statute regulates the practice in making such application, that practice will be followed in the federal courts.

MOTION for production and filing of certain papers.

W. T. Angell and *C. Bradley*, for plaintiff.

W. G. Roelker, for defendant.